



Consolidated Reply

Date: December 12, 2019
Subject: DAA-0567-2015-0013, Immigration and Customs Enforcement, Detainee Records

INTRODUCTION

Summary

On June 21, 2019, the National Archives and Records Administration (NARA) published a consolidated reply in the *Federal Register* to comments on proposed schedule DAA-0567-2015-0013 submitted by Immigration and Customs Enforcement (ICE) for Detainee Records, and opened it for a second round of public comments.

All comments received during the public comment period were considered and are now part of the administrative record, and are available to view here:

<https://www.regulations.gov/docket?D=NARA-19-0007>.

The final approved records schedule will be publicly available in NARA's Records Control Schedule (RCS) repository at <https://www.archives.gov/records-mgmt/rcs>. The RCS contains all schedules approved since 1973.

This report summarizes public comments submitted, and a discussion of the proposed records schedule.

Public Comment and Analysis Methodology

NARA appraisal staff reviewed public comments received from Regulations.gov during the comment period. NARA appraisal staff organized the comments to associate the comment with a particular item or topic in the schedule. Comments that expressed similar concerns were grouped together.

NARA drafted concern statements to represent each grouping of comments, along with responses that discuss the final decisions made by NARA, including noting any changes we have made to the proposed records schedule. This report presents public concerns arranged by topic, along with a representative sample of supporting quotations, and NARA's response.

Some comments were not within the scope of this schedule; therefore, they are not cited in this report. Out-of-scope comments are ones that are very general, apply to a broad range of records (or all records), pertain to items not included on the schedule, state a person's outlook or

philosophy without a suggestion specific to the schedule, and similar comments we cannot act on. As a result, we have not analyzed the schedule based on these comments.

NARA has carefully considered the public comments. NARA is approving the proposed schedule as revised, without further changes.

For further information, please contact Records Management Operations (ACR) by email at request.schedule@nara.gov; by phone at 301-837-1799; or by mail at National Archives and Records Administration; 8601 Adelphi Road; College Park, MD 20740-6001.

COMMENTS AND RESPONSES

Concern 1: Under the proposed schedule, sufficient records will not be available for historical and human rights research, accountability of ICE employees, to support the legal rights of harmed persons, or family member interest.

Sample quotes:

“...Records relating to deaths, abuses and other injustices are necessary, not only for attorneys who need access to these documents in order to provide accurate and reliable information while upholding the law, but also for families. Families need access to these records now and in the future. All people should have unimpeded access to records relating to their direct family members. If a descendant [sic] of someone who died while in custody of ICE wanted to find out more information about the circumstances of their parent, grandparent or great-grandparent, they should be able to find that one day. If not immediately, at least at some point in the future. Destroying these records would be a disservice to humanity. Please consider your ethical responsibilities as professionals when reviewing these changes. Destroying records relating to deaths, abuses, and other injustices, would be unethical in my opinion as an archivist. Regardless of if these people are here legally or illegally, it should be our responsibility as Americans and archivists to maintain accurate documentation of our Government's actions in how they treat anyone within our borders (and out). This is part of our democracy, of why we keep such records to begin with.....to hold our governing officials and employees accountable for their actions. Destroying these records would be counter intuitive to this important function of the National Archives. Thank you for your considerations. I am hopeful that the ethical thing to do will be done.” - Anonymous

“I am writing to say that these records concerning ICE and migrants detention should be kept in perpetuity, not for merely 20 years. 20 years is not enough time to hold these items - it is far too short (I say this as an archivist with a masters degree in the subject). These records are the only items to hold ICE accountable for the actions at the centers. The reasoning that these files do not document significant actions of federal officials is laughable. It's hard to argue how death,

sexual assault, and solitary confinement while in custody are not "significant actions". Since October 2016, there have been 10 deaths in immigration detention. These files are necessary for the public to understand, and evaluate these officers and the detention centers involved. I oppose this change in regulations." - Kristen Weischedel

"...To use the example of Japanese and Japanese-Americans who were interned as an example, while the Japanese Claims Act of 1948 provided some compensation to those who were interned and whose property was confiscated, the Office of Redress Administration, to provide restitution payment to eligible individuals of Japanese ancestry, was not established until 1988 under the guidance of the Civil Rights Division of the DOJ - more than 40 years after the war had ended. This provides just one example of how long-term retention of the records of those who have suffered human rights abuses while in the custody of the U.S. government has impacts beyond the immediate litigation resulting from claims brought by those individuals. Whole families have been impacted by this agency - in some cases, minors who may not be able to bring claims against the government for decades. Archives exist not only for historical value, but to first, and most importantly, as evidence to hold those in power to account for harm done to those in the custody of the U.S. government. This also doesn't just impact the United States justice system - these records may allow those impacted to bring claims in the international arena, as evidence of human rights abuses. For these reasons, I would strongly argue for a permanent retention period for files that document death, sexual assault, or other abuses by this agency of those in its custody. History will not look kindly on those in positions of power at NARA if this change is not made." - Katherine Crowe

"Records regarding the detention of migrants need to be available, at minimum, for the lifetime of the migrants and their children. These documents are important for the needed improvement for what is lacking in our current democracy and for its future success. Migrants have a right to access files regarding their stays in the centers, and as many are children, may not even request the files well into adulthood. The increase from 20 - 25 years for the retention of these documents is going in the right direction. I strongly urge the necessity of these documents to be held at a minimum of 75 years." - Joanna de la Cruz

"...I feel the need to point out that all items listed in the proposed records schedule have significant value to human rights researchers and watchdog organizations and should be maintained permanently. I am actually surprised that the records of Detention Service Monitors, detainee escapes, detainee segregation, and the Detainee Reporting and Information Line are listed as having little or no research value when, based on their descriptions, all would contain hints of (if not direct mentions of) abuses that occurred within the facilities. The Detainee Reporting and Information Line records especially would contain information that came straight from the detainees before being filtered

through ICE employees in their reports. I am further dismayed that the records of sexual assault and deaths which would directly document a pattern of abuse and/or inhumane conditions within detention facilities are not maintained permanently. These are records that will still have value to researchers many decades from now. ICE's operations and detentions are a part of American history, and it is our job as archivists to ensure that the historical record is not destroyed and history whitewashed.” - Amanda Munson

Response: When the National Archives appraises a series of records as temporary rather than permanent, it does not mean that the activities the records document are unimportant, or that the records lack any research use. Rather, it means that the anticipated research use will be more contemporary rather than many years into the future. Characteristics of anticipated research use and archival value overlap but are not identical. Many records that are of significant contemporary interest do not warrant permanent retention in the National Archives. Interested persons may request such records through the Freedom of Information Act (FOIA), and the agency that creates or maintains the records is required to preserve them for the period of time specified in an approved records retention schedule.

NARA accessions records that document legal status and rights of U.S. citizens despite the passage of time; that enable federal officials to explain past decisions, form future policy, and be accountable for consequences; and that provide the means for evaluating the effects of federal actions on individuals, communities, and the environment. This does not mean that all records documenting actions of federal officials and the effects of federal actions on communities must be permanent. Rather, it means that NARA must appraise records to ensure that adequate evidence of such activities is preserved. Records documenting significant actions of federal officials that are archivally permanent are those records that document the basic organizational structure of federal agencies and organizational changes over time; policies and procedures that pertain to an agency's core mission; and key agency decisions and actions. Records involving decisions of lower-level federal officials about operational matters such as segregated housing of individual detainees (Item 0008, Detainee Segregation Reports) or call center intake records (Item 0007, Detention Reporting Information Line Records) do not meet this threshold.

While we are sensitive to researcher interests, we must also balance such interests against resource considerations. We are guided by the Federal Records Act's goal of managing the accumulation of federal records, while sufficiently documenting the significant activities of the federal government. We must ensure that essential evidence of such activities is maintained in permanent records accessioned into the National Archives. While we do not deem the items proposed as temporary to meet the criteria for permanence established in NARA's appraisal policy, we recognize that many organizations and individuals do have interest in these records for purposes of accountability and transparency, and they may seek access to them at the originating agency through the Freedom of Information Act (FOIA). (NARA's appraisal policy, last revised in September 2007, is available at <https://www.archives.gov/records-mgmt/initiatives/appraisal.html>.)

For temporary items on the revised schedule, NARA has considered all applicable statutes of limitations and finds the proposed periods to be adequate. As NARA's appraisal policy explains, the legal rights implications of most records eventually expire. Commenters have not pointed to specific statutes of limitations that are not satisfied by the proposed retention periods. Moreover, while we consider that records should be maintained long enough to support legal rights of all parties, our appraisal policy does specifically refer to the status and rights of U.S. citizens. Therefore, records documenting matters related to citizens of other countries are less likely to be appraised as permanent than records pertaining to citizens of the United States.

One commenter requests that we accession any records that may contain "hints of...abuses." Possible inclusion of such hints is not sufficient to make a series of records appropriate for permanent retention in the National Archives. NARA must, however, ensure that the retention period is sufficient to support any relevant investigations or litigation, which we have done.

Some commenters compare ICE detention practices with the forced relocation and incarceration of Japanese-Americans in the 1940s. NARA does not find the comparison compelling. While ICE detains aliens on the basis of immigration status, Japanese internment involved the detention of U.S. citizens on the basis of ethnicity or national origin.

The records proposed for disposition do not include unique information that link family members. The records proposed as temporary on this schedule are not the only sources of such information. Data from ICE's Enforcement Integrated Database (EID) are currently retained for 75 years in the Enforcement Integrated Database. See the [DHS records schedule on Biometric with Limited Biographical Data](#), item 3.1, *Law Enforcement: Identification, investigation, apprehension, and/or removal of aliens unlawfully entering or president [sic] in the United States and facilitate entry of individuals into the United States*, DAA-0563-2013-0001-0006.

Finally, one commenter states that migrants have a right to access all files regarding time spent in detention for the duration of their lifetimes. The commenter does not point to any requirement in law or regulation that all records related to detention be maintained for the lifetime of the detainee. We also point out that the EID data mentioned above are 75-year records for which detained migrants can file FOIA and/or Privacy Act requests.

Concern 2: The schedule does not include sufficient permanent documentation of deaths in custody and the ensuing investigations.

Sample quotes:

"...[ERO Detainee Death Review Files] should be retained permanently. Given NARA's description of the scope and content of this series, we believe the Enforcement and Removal Operations (ERO) Detainee Death Review Files provide a more robust documentation of detainee deaths than the Office of Professional Responsibility (OPR) Detainee Death Review Files (new Item 0003) or the Detainee Death Reports (new Item 0004), and bring together information from disparate sources, creating a more complete picture of the events

surrounding the deaths of individuals in federal custody. Given the significance of the events documented, we believe that the ERO Detainee Death Review Files will be researched by future generations. Further, although NARA states that “most if not all” (1) of the records accumulated in the ERO Death Review files are already scheduled elsewhere, we believe this fragmentation of documentary evidence will place undue and unnecessary burden on the researcher to find and compile information from various places.” - Archivists Round Table of Metropolitan New York

Response: Although records of death reviews conducted by ERO are appraised as temporary, those created by OPR are recommended for permanent retention. We believe maintaining both sets of files permanently would be unnecessarily duplicative. NARA has reviewed both series and determined that the OPR death review files are the most informative, because they include a higher level of analysis of the event by ICE investigators. The OPR files constitute sufficient documentation of this federal activity. The materials gathered from disparate sources that are included in the ERO file are themselves mostly temporary records. Alien File (A-File) materials are permanent records that are sometimes included in whole or in part in the ERO file.

Concern 3: If records of sexual assault and abuse investigations are destroyed, sufficient documentation will not be available for research by scholars, investigators, and family members.

Sample quotes:

“Keep sexual assault and abuse files forever for research, family members research, and accountability, and for prosecuting crimes.” - Anonymous

“ART believes these records [Detainee Sexual Abuse and Assault Files] should be retained permanently. The files comprise a more robust documentation of detainee sexual abuse and assault reports than the data retained in Significant Event Notification System Master File/Data (NI-567-11-4) and the Department of Homeland Security, Annual and Other Reports to Congress, DAA-0563-2013-0005-0001. (1) That only cases deemed “significant” by ICE will be retained in the Significant Event Notification System Master File/Data, and that only “some” sexual abuse and assault incidents and data will be retained in the Department of Homeland Security, Annual and Other Reports to Congress, is troubling....”- Archivists Round Table of Metropolitan New York

“...I think its [sic] urgently important to retain all CBP and ICE records, in perpetuity, for future court system discovery phases, policy development, and historical purposes. Twenty-five years is not enough time for subsequent legal and associated business rights and interests. [...] Given especially the nature of and shame around discussing sexual assault and the disproportionate power dynamics between detainees and the officers in question, particularly with the American political system in mind, it can take many years for an investigation to be opened,

researched, and concluded, and I believe this time period expands that of 25 years.” - Ahley Blewer

Response: The retention period for sexual assault and abuse files is well in excess of the 10-year minimum prescribed by the regulations implementing the Prison Rape Elimination Act for the Department of Homeland Security (6 C.F.R. §115.89). A 25-year period is sufficient to ensure that the rights of victims are protected. It is also sufficient to retain the records for applicable statutes of limitations. The commenter does not point to a statute or regulation that would support a need to maintain the records in excess of the proposed 25 years.

The definition of “significant event” is not as subjective as the comment suggests. Any allegation of sexual assault or abuse is categorically significant; ICE requires that any and all such allegations be entered into the system. Although the SEN Master File is a temporary record, it is a long-term temporary period (75 years) under *Significant Event Notification System Master File/Data, N1-567-11-4/1*. This retention period is sufficient to protect the rights and interests of those abused and detained

Concern 4: Destruction of sexual assault and abuse case files and ERO death review files, and other records of detention will allow criminal activity to go unpunished and will harm the ability of descendants to access records about the circumstances of death as well as important medical information.

Sample quotes:

“All records need to be kept. What if there is a child born from the sexual assault? That child deserves to be able to complete a medical history. What if a person suffers from a mental condition after being left in solitary confinement? That person should be able to prove that it happened to them. My fear is that records will be destroyed to protect ICE officers from prosecution. That would be a tragedy.” - Anonymous

“[...] [T]hese records document the abuse and death of individuals in the custody of the United States Government. Investigations into these crimes will almost definitely take place after the proposed retention period will end, at which point any court proceedings will lack the necessary documents to fully prosecute any case. These records will also be vital in investigating human rights abuses on the international stage. Beyond the legal ramifications, future historians and scholars deserve access to the full record of this historical moment. These files do not reflect day-to-day activities of a normal federal agency. They document violence perpetrated by our government and these records must be preserved. For these reasons, I urge NARA to implement a permanent retention period for files that document death, sexual assault, or other abuses by this agency of those in its custody.” - Alice Prael

Response: NARA does not consider that the proposed retention periods are improper or prevent access to essential evidence about medical condition or deaths in custody. The retention periods for items 0008, Detainee Segregation Reports and 0001, Detainee Sexual Abuse and Assault Files, do not protect anyone from prosecution. NARA has considered all applicable statutes of limitations for bringing claims against the federal Government. ICE investigates allegations of sexual assault and abuse immediately upon receipt of an allegation. If an ICE official is found to have committed misconduct involving a sexual abuse or assault, the record of the investigation is permanent under proposed schedule item Internal Affairs Significant Misconduct Investigative Case Files, DAA-0567-2015-0012-0001 (pending). While investigation case files are proposed for destruction after 25 years, incidents of sexual assault and abuse are also documented in the Significant Events Notification (SEN) System, a 75-year record in *Significant Event Notification System Master File/Data, N1-567-11-4/1*. The investigative case file is therefore not the only record series documenting an incident. Such records are not medical files, and do not contain records supporting a “complete medical history.” In addition, investigations into deaths of detainees in ICE custody are permanent under proposed Item 0003, Office of Professional Responsibility (OPR) Detainee Death Review Files.

Concern 5: Records proposed for destruction favor documenting high-level activities over unfiltered or broader ranges of perspectives.

Sample quotes:

“... I am calling for you to require very long or permanent retention of ICE's sexual abuse/assault records; a longer retention (at least to allow for legal/scholarly review) of ICE's reports of day-to-day activities, which are a much less mediated account of events than the "significant event notification system" records you suggest as an alternative; and retention of ICE's DRIL records on the grounds that, as records which originate from outside the agency with the initiation of calls, they represent a broader range of perspectives on the conditions in ICE detention facilities. Again, these records record and have the potential to shed light on a major political, social and cultural controversy of our time-- their significance makes them worth preserving.” - Sara Jorgensen

“ART believes these records [Revised Item 0007 Detention Reporting Information Line (DRIL)] should be retained permanently. Although some of the reporting in the DRIL records may be documented in other places, as a body of records these could be useful for studying detention practices, including the percentage of individuals detained versus monitored, and how such decisions were made. The DRIL records could have a high research value as a complete data set.” - Archivists Round Table of Metropolitan New York

The appraisal “privileges top-down decisions and summaries of the historical record over more inclusive perspectives of all who are involved in such cases....” -Archivists Round Table of Metropolitan New York

“...The Detainee Reporting and Information Line records especially would contain information that came straight from the detainees before being filtered through ICE employees in their reports. I am further dismayed that the records of sexual assault and deaths which would directly document a pattern of abuse and/or inhumane conditions within detention facilities are not maintained permanently. These are records that will still have value to researchers many decades from now. ICE's operations and detentions are a part of American history, and it is our job as archivists to ensure that the historical record is not destroyed and history whitewashed.” - Amanda Munson

Response: Some commenters suggest that NARA should accession additional items on the schedule to promote “inclusive perspectives” in its holdings. Such an approach to appraisal would be inconsistent with our appraisal policy. As the archives of the U.S. Government, our policy does in fact consider documentation of high-level federal decision-making more archivally significant than “inclusive perspectives of all who are involved.” Institutions with different missions may establish documentation strategies to capture other perspectives on federal decision-making that the commenters value.

Similarly, NARA does not, for purposes of records appraisal, privilege “information that came straight from the detainees” over records not “filtered” by the agency. On the contrary, complaints that proceed through agency processes are more, not less, likely to meet criteria for permanent retention because they reflect more thorough investigation and assessment.

Concern 6: Disposition and retention periods do not adequately consider the controversial nature of ICE’s activities or future legislation that may affect statutes of limitations.

Sample quotes:

“...The growing media coverage of the mistreatment of detainees by ICE in detention facilities is tantamount to concentration camps. This is not a hyperbolic statement, and several historians have shown that these facilities fit any rational definition of concentration camps. That being said, these are actions by American government officials and employees that need to be recorded. They need to be recorded in detail, without a destruction schedule, for the purposes of future oversight and to complete the historical record. NARA's decision to approve the Department of Homeland Security's request for disposition of these records after a short period is abhorrent and goes against the standards of archival retention and historical common sense. EVERYTHING having to do with the Department's actions is important, let alone how it treats human beings on American soil, be they citizens or not.” -Andrew Harman

Response: NARA regulations at 36 C.F.R. 1226.18 allow for records to be kept beyond their approved retention period if special circumstances, including litigation or a change in law, warrant it. In addition, NARA considers disposal of records subject to a FOIA request or a

litigation hold to be an unlawful destruction of records, per 36 C.F.R. 1230.3. NARA does not make appraisal decisions regarding legal rights and accountability by speculating about legislation that future Congresses may enact. Nor does NARA base assessments of the adequacy of proposed retention periods for legal rights and accountability on anticipation of changes in public policy decades into the future.

Concern 7: Records of detention may be needed to prove residency.

Sample quotes:

“Records related to ICE are essential documentation that immigrants and refugees (and their families) can use to justify their residency and are forms of evidence to hold the US government accountable. I support the expansion of the retention period for these records. There is historical and evidential value for these records, arguably for permanent retention.” - Anonymous

Response: While it is unclear how time spent in ICE custody in undocumented status would support detainees’ petitions for adjustment of immigration status, time spent in and location of detention are data points maintained in ICE’s Integrated Enforcement Database, which is maintained for 75 years under *Department of Homeland Security, Law Enforcement: Identification, investigation, apprehension, and/or removal of aliens unlawfully entering or president [sic] in the United States and facilitate entry of individuals into the United States, DAA-0563-2013-0001-0006*.

Concern 8: Records documenting segregated housing of detainees are of significance for legal rights and research and should be kept longer or made permanent.

Sample quotes:

“Revised Item 0008: Detainee Segregation Reports, which documents placement of detainees in segregated housing for punitive and allegedly non-punitive reasons such as mental health or being LGBTQ, increases the retention period to seven years from the end of the fiscal year in which the detainee is released from segregation. This creates a situation in which a detainee could potentially be released from segregation but still be in detention and continue to be unable to access their records. This recommended retention period, which starts from the time the detainee is released from segregation, but not from detention, does not guarantee enough time for individuals to be able to access their records in pursuit of legal action. Aside from the use for a potential civil action for deprivation of rights under Under 42 U.S.C. 1983 mentioned in the schedule, the records would be necessary to corroborate the sexual or gender identity of LGBTQ asylum seekers in the event their petitions are denied on the grounds of insufficient evidence of their status as sexual minorities and would be essential in the filing of appeals or motions to reopen their cases - the duration of which depends on USCIS processing times and is not definite.” - Jenny Patino

Response: Placement in detention, including segregated detention, does not prevent detainees from requesting access to agency records or from accessing their own papers. According to ICE's Performance-Based National Detention Standards, detainees in segregated housing generally receive the same privileges as detainees housed in the general population. For example, they are able to send and receive correspondence, and have opportunities for general visitation, including legal visitation. The standards include access to telephones, personal legal materials, law library materials and legal visits.

Average length of stay in detention in recent years has ranged between 21 and 46 days. When detainees are placed in segregated housing, few remain in segregated housing for more than 14 days. A very small number of detainees are held in segregated housing for periods measured in years not months.

ICE does not track an individual's self-identification as lesbian, gay, or bisexual. In November 2015, ICE updated data systems to capture an individual's self-identification as transgender. These records are maintained in the Enforcement Integrated Database for 75 years under *Department of Homeland Security, Law Enforcement: Identification, investigation, apprehension, and/or removal of aliens unlawfully entering or president [sic] in the United States and facilitate entry of individuals into the United States, DAA-0563-2013-0001-0006.*

Detainee Segregation Reports are not the only records documenting administrative segregation. Placement in segregated housing is also noted in the Detention Case File, which is maintained for 6 years after a detainee's removal from the United States, or transfer or release from the detention facility, in accordance with the schedule for *Detention Case Files, NI-567-11-14/1.*